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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,

Petitioners,

v.

NATHALIE NORRIS *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN FEDERATION OF TEACHERS, AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

To assist in the recruitment and retention of qualified employees, the State of Arizona has adopted a deferred compensation plan under which participating employees direct the State to invest a portion of their salaries in tax-deferred accounts offered by private insurance companies and other financial institutions. At retirement, employees can elect to recover the income so accumulated either by receiving the total amount in a lump-sum payment or by purchasing an annuity from an insurance company selected by the State as a funding medium. Under Arizona's plan, life annuitants who have accumulated the same sums during their worklives and retire at the same age nevertheless receive different monthly benefits depending on their sex. A retired female employee receives less per month than a comparably aged, comparably situated retired male employee.

Does Title VII of the Civil Rights Act of 1964, as construed in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), prohibit the State of Arizona from adopting a voluntary deferred compensation plan that pays a smaller monthly annuity benefit to female retirees solely because of their sex?

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN FEDERATION OF TEACHERS, AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

This brief is filed, with the consent of all petitioners and respondents, on behalf of the American Association of University Professors ("AAUP"), the American Federation of Teachers ("AFT"), and the National Education Association ("NEA"), *amici curiae*, in support of the respondents.

INTEREST OF THE *AMICI*

The *amici curiae* are three of the nation's largest organizations of teaching professionals. Many of their members participate in employer-sponsored defined contribution annuity plans that pay smaller periodic benefits

to retired female employees than to comparably situated males.

The American Association of University Professors is a membership association of 70,000 faculty members and research scholars at American institutions of higher education. Founded in 1915, it is the oldest and largest association of its kind in the country. Approximately 80 percent of its members are male. The AAUP has chapters on 1,300 campuses, and 80 of its chapters engage in collective bargaining on behalf of faculty members.

The AAUP has long been committed to the elimination of sex discrimination in the higher education community. Even before this Court's decision in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), the AAUP formally sought to eradicate widespread discrimination against women in the funding and management of university pension plans. Since 1974, the AAUP has repeatedly urged the Teachers Insurance and Annuity Association and the College Retirement Equities Fund ("TIAA-CREF"), the principal annuity asociations to which college and university faculty members belong, to stop the practice of using sex-based actuarial tables to derive substantially lower retirement benefits for women than men with equivalent income histories. TIAA-CREF's refusal to adopt a single actuarial table for annuitants of both sexes has generated litigation between TIAA-CREF and the AAUP raising issues similar to those presented here.[1]

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[1] The AAUP, AFT, and NEA participated as *amici curiae* in support of the petition for certiorari in Peters v. Wayne State University, *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 10, 1982) (No. 82-794). In addition, the AAUP is a respondent in two closely related cases: Teachers Insurance and Annuity Association v. Spirt, *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791), and Long Island University v. Spirt, *petition for cert. filed*, 51 U.S.L.W. 3461 (U.S. Nov. 30, 1982) (No. 82-913).

The American Federation of Teachers (AFL-CIO) is an organization of teachers and faculty members employed in institutions of higher education as well as in elementary and secondary schools. Nearly 80,000 of its 560,000 members are employed in higher education, and AFT locals represent higher education faculty in formal collective bargaining relationships at about 240 institutions across the country. Operating on the national level, as well as through its affiliated locals, the AFT is committed to the establishment and preservation of sex-neutral policies in all aspects of the employment relationships of its members.

The National Education Association is the largest organization of education employees in the United States, with a current membership of approximately 1.7 million persons. A significant number of NEA members are employed in institutions of higher education, and most of these members participate in TIAA-CREF retirement plans. One of the NEA's purposes is to safeguard the constitutional and statutory rights of its members, including the right of its female members to be free from sex-based discrimination in pension and annuity plans.

The *amici curiae* are well situated to speak for pension plan participants who have a direct stake in the outcome of this case. The views of the men and women who will one day receive TIAA-CREF pension benefits may be helpful to the Court in considering and eventually resolving the issues raised in the petitioners' brief.

(These three cases are collectively referred to hereinafter as the "TIAA-CREF cases.")

The AAUP, with the American Civil Liberties Union, also participated as *amicus curiae* in *Manhart* when the Court decided that case during the 1977 Term.

SUMMARY OF ARGUMENT

We focus in this *amicus* brief on the relationship between the State of Arizona and the private insurance companies selected by Arizona to serve as funding media for the State's deferred compensation retirement plan.

Arizona describes this relationship as a distant one. The State asserts that it is "not responsible" for discriminating against female retirees. "Respondent's complaint," the State argues, "really challenges the practices of the nonparty, independent insurance carriers which uniformly use sex-based actuarial tables."[2] Arizona asserts that, because the insurance companies rather than the employer committed the conduct complained of, it lacks the discriminatory motivation purportedly required of Title VII defendants by this Court's decisions in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), and other cases.[3]

In Point I of our brief, we examine Arizona's contention that it is not responsible for discrimination practiced by what it describes as "independent" insurance companies. The respondents, however, are not complaining about the *insurers'* conduct.[4] Their grievance is that Arizona has chosen to implement an annuity plan that pays different periodic benefits to its retired employees solely on the basis of their sex. It is the employer's decision to adopt and implement that plan—not simply the

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[2] Pet. Br. 11, 13. (As used in this footnote and hereinafter, the abbreviation "Pet. Br." refers to the Brief of Petitioners filed November 24, 1982; the abbreviation "Pet. App." refers to the Appendix to the petition for certiorari; and the abbreviation "J.A." refers to the Joint Appendix filed by the parties in this Court.)

[3] Pet. Br. 23-28.

[4] There is no insurance company defendant in this case. Whether an insurer can be liable under Title VII is a disputed issue in the TIAA-CREF cases, *supra* note 1, but it is not an issue here.

insurers' use of sex-differentiated mortality tables—that discriminates against individual female retirees in violation of Title VII. To hold otherwise would be to ignore the reasoning behind the Court's decision in *Manhart* and to undermine the remedial policies Title VII was designed to promote.

Virtually every lower court considering the issue has held, on the strength of *Manhart*, that an employer violates Title VII by adopting a discriminatory plan, regardless of the extent to which third-party insurers are involved. In this case, despite Arizona's protestations to the contrary, the record shows that the State was intimately involved in the design and implementation of the deferred compensation plan. The fact that parts of the plan were delegated to insurers does not absolve the State from liability under Title VII.

Point II addresses Arizona's related argument that the complainants were obliged to prove discriminatory motivation on the employer's part. In *Burdine*, *Furnco*, and the other disparate treatment cases relied upon by Arizona, complainants had occasion to refute an employer's pretextual justification for discriminatory conduct by showing that the employer did, in fact, differentiate among employees on the basis of their race or sex and not for other asserted reasons. Here, by contrast, Arizona's deferred compensation plan (like the pension plan in *Manhart*) is explicitly a sex-based plan. It pays inferior monthly benefits to women, and the calculation according to which the benefits are derived is admittedly made on the basis of sex alone; in other words, the employer nowhere suggests that the calculation merely *appears* to be based on the beneficiary's sex but in fact is not. There is accordingly no occasion to rebut other possible or plausible reasons that might explain disparate treatment of employees in other contexts. Notions of "intent" and "pretext" borrowed from *Burdine*, *Furnco* and other cases are misplaced. To prevail, Arizona must show that

sex-based determinations for computing monthly benefits for women are not forbidden by Title VII. Our position, in turn, is that they are forbidden, exactly as this Court held in *Manhart*.

Point III responds to arguments made by several *amici curiae* concerning the applicability of the McCarran-Ferguson Act. We conclude, along with the lower courts that have decided the issue, that the McCarran-Ferguson Act does not insulate an employer from liability under Title VII.

In sum, Arizona's plan unlawfully discriminates because its classifies retirees by sex on the basis of a generalization ("women live longer than men") that is false with respect to most women and thus denies them their equal rights as individuals on account of a sex-based actuarial preference chosen by the employer. The discrimination is not alleviated simply because the employer makes use of services provided by insurance companies instead of operating the plan wholly by itself.

ARGUMENT

Introduction

There is a troubling implication to arguments advanced by Arizona when viewed in light of assertions made by insurance companies in other pension discrimination cases. In all of these cases, female employees complain that defined contribution annuity plans which pay smaller post-retirement periodic benefits to women than to comparably situated men violate Title VII of the 1964 Civil Rights Act.[5] In this case, Arizona attributes to the "non-party, independent insurance carriers" whatever liability is created by the use of sex-differentiated mortality tables. But in the TIAA-CREF cases, where insurance compa-

[5] Civil Rights Act of 1964, Tit. VII, 42 U.S.C. § 2000e *et seq.* (1976 & Supp. IV 1980), *as amended by* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

nies *are* joined as parties, those companies insist that they are immune from liability under Title VII because they are not "employers" within the statutory meaning of that term.[6] The employer blames the insurance company, while the insurance company argues that only an employer can be blameworthy under Title VII. Were both to prevail, aggrieved employees would find themselves with nobody to sue, victims with no remedy.

By each pointing an accusing finger at the other, employer and insurer bring an important question into focus. The involvement of third-party insurance companies here and in the TIAA-CREF cases distinguishes these annuity plans from the one the Court considered in *Manhart*. Does this distinction, by itself, justify a different outcome here? The answer has wide consequences since many private-sector pension plans rely to some extent on services provided by independent insurance companies. If the involvement of a private insurer, without more, becomes a legal predicate for distinguishing the second generation of pension discrimination cases from *Manhart*, then much of *Manhart* is undermined.

Manhart held that an employer violated Title VII by distinguishing between employees on the basis of a sexual generalization that, although true when applied to the members of the class as a whole, was not dependably true with respect to individual employees. Title VII, the Court said, "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class .... [T]he basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes."[7] Without sacrificing that policy, can it be said that the State of Arizona, by using mortality tables supplied by

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[6] *See* Petition for a Writ of Certiorari 16-17 *in* Teachers Ins. & Annuity Ass'n v. Spirt, *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791).

[7] 435 U.S. at 708, 709.

insurance companies instead of deriving its own tables, is treating individual female employees more fairly than the City of Los Angeles did in *Manhart*?

The answer is plain. In each case, it is the employer who has adopted a plan that categorizes employees by sex and treats female employees worse—significantly worse [8]—than their male counterparts solely because of their sex. From the vantage point of the aggrieved female employee contemplating the conditions of her employment, the discrimination she endures under Arizona's plan is inseparably featured in that plan, which prescribes what she can expect to receive as an incident of her employment—exactly as in *Manhart*.[9] Arizona has chosen to implement a pension plan under which female retirees receive smaller periodic benefits than comparably situated males. It is that choice that violates Title VII.

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[8] Respondent Nathalie Norris will receive $320.11 per month when she retires at age 65. A similarly situated male would receive $354.06 per month—10.6 percent more. J.A. 12.

[9] Arizona has avoided the temptation to offer a justification for the disparity in treatment between male and female retirees under its deferred compensation plan. Some of the *amici curiae*, however, have succumbed. *E.g.*, Brief of Teachers Insurance and Annuity Association and College Retirement Equities Fund as Amici Curiae in Support of Petitioners 5-6 (hereinafter referred to as the "TIAA-CREF *Amicus* Br."). These *amici* argue that the payment of smaller periodic benefits to women is justified by concepts of actuarial "[e]quity." TIAA-CREF *Amicus* Br. 5.

The principle of "actuarial equivalence," as it is more formally called by the American Academy of Actuaries in its *amicus* brief (Brief of American Academy of Actuaries as Amicus Curiae 20 (hereinafter referred to as the "A.A.A. *Amicus* Br.")), holds that periodic annuity payments may be adjusted to reflect differences in mortality rates for classes of annuitants in order to avoid subsidization of one class by another. A monthly annuity of $90 for a woman may be actuarially equivalent to a monthly payment of $100 for a man, because the discounted value of the "stream of payments" contemplated under a lifetime annuity is the same for the

I. The Employer is Liable Under Title VII for Adopting a Discriminatory Pension Plan.

Many of the post-*Manhart* cases in the lower courts involve pension plans administered in part by private insurers. These cases unanimously hold that employers who affirmatively adopt institutional pension plans for their employees subject themselves to potential liability for the discriminatory practices of third-party insurers.

In *Equal Employment Opportunity Commission v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), the government sued a college employer for adopting a TIAA-CREF pension plan paying smaller periodic benefits to female retirees than to males. The college claimed that it was not liable because TIAA-CREF negotiated its annuity contracts directly with college faculty members without involving the institutional employer. The court responded:

> Colby may quarrel with our short-hand statement that it insures its faculty with TIAA, but we quarrel even more with its contention that it is divorced altogether from the transaction . . . . Colby is more than a broker, or other intermediary, that enables the parties to enter into the arrangement . . . . [A]n educational institution's adoption of TIAA "constitutes affirmative, active participation," without which "the challenged program could not operate." [10]

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class of female annuitants and the class of male annuitants. A.A.A. *Amicus* Br. 12.

Manhart, however, squarely holds that actuarial equivalence is not a defense in a Title VII pension discrimination case, because the principle's emphasis on classes of annuitants is inconsistent with the statute's "focus on fairness to individuals . . . ." 435 U.S. at 709, 710. *Manhart* also rejects the notion that cross-subsidization of one class of employees by another class is objectionable. *Id.* at 710. The effort by some *amici curiae* to resurrect these notions is nothing less than an attempt to reargue *Manhart*.

[10] 589 F.2d at 1141, quoting from Spirt v. Teachers Ins. & Annuity Ass'n, 416 F. Supp. 1019, 1021, 1022 (S.D.N.Y. 1976),

Wayne State University advanced a variation of the same argument in *Peters*, another case involving a TIAA-CREF annuity plan. According to the university, TIAA-CREF had "unilaterally decided" to use separate mortality tables for male and female retirees, without asking the employer to endorse or ratify their use.[11] This was enough, the university argued, to make TIAA-CREF the only party that could be liable under Title VII. The trial court disagreed: "The ties between [employer] and [insurer] are too great to allow them to each deny liability on account of the actions of the other." [12]

Title VII is violated, not by an insurer's reliance on separate tables, but by an employer's *adoption* of a pension plan that classifies employees by sex to the detriment

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aff'd, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791). *Accord*, Sobel v. Yeshiva Univ., 477 F. Supp. 1161, 1166 n. 4 (S.D.N.Y. 1979).

[11] Peters v. Wayne State Univ., 476 F. Supp. 1343, 1345 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 10, 1982) (No. 82-794).

[12] *Id.* at 1350.

Although the Sixth Circuit subsequently reversed the judgment of the trial court on other grounds, it affirmed and even expanded this holding:

> Wayne State emphasizes . . . that Teachers Annuity contracts directly with Wayne State employees, and that Wayne State's role is primarily administrative rather than policy-making. None of these facts relieves Wayne State of responsibility for *choosing* Teachers Annuity's retirement plan for its employees.

Peters v. Wayne State Univ., *supra* note 11, 691 F.2d at 238 (emphasis in the original).

The references in the petitioners' brief to the appellate court decision in *Peters* (Pet. Br. 12, 23) are somewhat misleading. Twice, the petitioners cite language from the *Peters* decision to the effect that TIAA-CREF did not operate as Wayne State's "agent"; what the petitioners fail to mention, however, is that TIAA-CREF's status under agency law was relevant, in the court's eyes, to *TIAA-CREF's* liability under Title VII, not Wayne State's.

of female members of the workforce.[13] The act of "choosing" a particular insurer, *Peters*, *supra*, 691 F.2d at 238, or "adopt[ing]" an insurer's system, *Colby College*, *supra*, 589 F.2d at 1141, or becoming "involve[d] in the overall program," *Spirt v. Teachers Insurance & Annuity Association*, 475 F. Supp. 1298, 1308-1309 n.16

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[13] It is possible that an employer who sponsors a defined benefit plan (rather than the defined contribution plans at issue here and in the TIAA-CREF cases) might take into account the different mortality rates of male and female employees in setting the amount of employer contributions to the pension pool. *See* A.A.A. *Amicus* Br., *supra* note 9, at 5. For example, one employer whose work force is 50 percent female may need to set aside a larger pension pool than another employer whose work force is only 20 percent female. In determining exactly how much money an employer must allocate to the pension pool, the employer may be permitted to take into account the different mortality rates of the class of male and the class of female employees. So long as each employee is required to contribute equally to the plan and receives comparable benefits, the requirements of Title VII are satisfied. It is not the mere use of separate mortality tables that offends the statute; it is the employer's decision to treat females differently than males because of their sex.

But even under these circumstances, the use of sex-based tables may not be actuarially required, or even actuarially sound. Actuaries are not of one mind with respect to the predictive accuracy of sex-based mortality tables or the need to use such tables. *See, e.g.*, Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 535 (1980). Most pension plans—"[t]he overwhelming majority" of them, to use the Labor Department's words—do not distinguish between men and women in the provision of retirement benefits. Dep't of Labor, Wage and Hour Div., "Amendment to Interpretive Bulletin," 43 Fed. Reg. 38029, 38030 (1978). Employers who, for legal or equitable reasons, were reluctant to sponsor plans incorporating sex-based tables have found insurers willing to provide pension coverage on a "unisex" basis. *E.g.*, "U. of Minnesota Adopts Unisex Plan for Pensions: 'Right Thing to Do,'" CHRONICLE OF HIGHER EDUCATION, Oct. 13, 1982, at 25. In short, it is incorrect to suggest that employers must rely on sex as a predictor of longevity, or cannot find insurers willing to provide benefits on a unisex basis.

(S.D.N.Y. 1979),[14] brings an employer within the reach of Title VII.[15]

By contrast, an employer who serves as nothing more than a "broker" or "intermediary," *see Colby College*, *supra*, 589 F.2d at 1141, bringing together insurers and employees who negotiate their own pension arrangements without the employer's sponsorship, cannot be said to have adopted an institutional pension plan at all, and cannot, therefore, be liable for the *unsanctioned* payment of sex-differentiated annuity benefits by an independent insurer. For example, an employer who collects information from pension plan operators and distributors the brochures to employees should not be liable for the discriminatory practices of those insurers. If the employer serves merely as a clearinghouse for employees who are responsible for making independent decisions on pension coverage, then the discriminatory practices of those insurers should not be imputed to the employer.

This, indeed, is a logical corollary of the "open market" dictum in *Manhart*.[16] The Court's reference to the "open

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[14] *Aff'd in part and rev'd in part*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791).

[15] *See* Van Alstyne, *Equality for Individuals or Equality for Groups: Implications of the Supreme Court Decision in the Manhart Case*, 64 AAUP BULL. 150 (1978). Professor Van Alstyne proposes a simple decisional rule:

> What the employer cannot do directly, the employer cannot do indirectly. If the employer cannot find a third party agreeable to the employer's own duty of nondiscrimination toward its employees, it has two choices under Title VII: provide the service itself (on nondiscriminatory terms) or abandon it altogether. What an employer may *not* do, however, is to provide it in any manner (including by arrangement with a third party) which discriminates among the employer's own employees by race, sex, religion, or national origin. [*Id.* at 154; emphasis in the original.]

[16] "[I]t would [not] be unlawful for an employer to set aside equal retirement contributions for each employee and let each re-

market" is not meant to encourage an employer's proffer of pension benefits on discriminatory terms; it simply allows an employer to serve as custodian of its employees' retirement contributions, leaving employees at retirement to the vicissitudes of a possibly discriminatory market. But it is one thing to say that an employer is under no obligation to correct discriminatory practices fostered by the marketplace, and quite another to permit the employer to *import* those practices into its own plan.

General Building Contractors Ass'n v. *Pennsylvania*, —— U.S. ——, 50 U.S.L.W. 4975 (U.S. June 29, 1982) (No. 81-280), is not inconsistent with our analysis. The employer's liability in a pension discrimination case is not the kind of vicarious liability with which the Court was concerned in *General Building Contractors*, but an independent liability derived from Title VII and unrelated to concepts of *respondeat superior* or nondelegable duty. In *General Building Contractors*, employers entered into a facially neutral hiring plan operated by a labor union. Unbeknownst to the employers, and in contravention of the agreement, the union operated the plan in a manner that discriminated against black job applicants. 50 U.S.L.W. at 4976. Here, by contrast, employees challenge a facially discriminatory employment practice on disparate *treatment* grounds, and have shown that the employer knew of and condoned differential treatment for male and female retirees. Title VII makes it unlawful for an *employer* to discriminate against any individual with respect to the terms or conditions of employment, and it is the employer's conduct that forms the basis for a statutory violation. Our analysis is predicated on the language of the statute, not on common-law notions of agency.[17]

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tiree purchase the largest benefit which his or her accumulated contributions could command in the open market." 435 U.S. at 717-18.

[17] We should add parenthetically that, even if the Court were to adopt the *respondeat superior* approach of *General Building Contractors*, it is far from clear that the result here would be the same as in that case. Arizona exercises considerably more control over the

Pension plans are structured in many ways, each one varying to some extent in the relationship between employer and insurer.[18] All plans, however, have one thing in common: they involve the payment of "compensation" by an "employer" within the meaning of those terms in Title VII.[19] To allow the involvement of insurance com-

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actions of the insurance companies here than the employers exercised over the labor union in *General Building Contractors*.

[18] *See generally* A.A.A. *Amicus* Br., *supra* note 9, at 4-9. *See also* Pet. Br. 3-6 (description of Arizona's plan); TIAA-CREF *Amicus* Br. 3-4 (description of TIAA-CREF's plan).

The relationship between college employers and TIAA-CREF is extraordinarily close, the product of TIAA-CREF's history and the unique configuration of its national pension system. *See Colby College, supra*, 589 F.2d at 1141; *Peters, supra*, 476 F. Supp. at 1346. *See generally* Greenough, W., & King, F., BENEFIT PLANS IN AMERICAN COLLEGES 8-14, 39-49 (1969) (referred to below as "BENEFIT PLANS"). There are many reasons why the relationship between TIAA-CREF and college employers is closer than the relationship that ordinarily exists between insurer and employer. TIAA-CREF was originally conceived and organized by the Carnegie Foundation for the Advancement of Teaching, and has always maintained close ties with the teaching profession. *See* Memorandum for Respondent American Association of University Professors 3-5, *in* Teachers Ins. & Annuity Ass'n v. Spirt, *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791). Institutional employers must pass enabling resolutions establishing eligibility standards. In most instances, the college requires employees to participate in the plan, and—perhaps most importantly—matches employee contributions with contributions of its own. BENEFIT PLANS 39-49. As one lower court has held, the activities of TIAA-CREF "are so closely intertwined" with college and university employers that they are essentially one entity for Title VII purposes. Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1063 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791).

In all these respects, the TIAA-CREF plan differs from Arizona's deferred compensation plan. While we believe, for reasons stated in the text, that Arizona is not insulated from liability, we note that this is even more clearly the situation in the TIAA-CREF cases pending before the Court on petition.

[19] *See Manhart*, 435 U.S. at 712 n. 23 ("pension benefits . . . are 'compensation' under Title VII").

panies to insulate the employer from Title VII liability "would impair the effectiveness of the Act." [20]

Arizona's deferred compensation plan requires close collaboration between the state and the insurers selected to manage the plan. The court below identified several examples of employer involvement in the plan:

> [T]he adoption of the plan constitutes active participation without which the challenged program could not operate. Arizona made the selection of certain companies as funding media. It approved participation in the plan and deducted the appropriate amount from the employee's salary.[21]

It is clear, in sum, that Arizona acts as considerably more than a "broker." The state is actively involved in the funding and management of the plan. The state selected the insurance companies whose actuarial practices it now disowns. Having chosen to operate an annuity plan, the state must see to it that the plan complies with Title VII. In this case, Arizona operates a plan that classifies retirees by sex. The state must answer for its conduct, as the court below appropriately held.

II. A "Facially Discriminatory" Employment Practice, Such As the Classification of Retirees by Sex, Constitutes Intentional Discrimination Under Title VII.

Arizona also asserts that a finding of discriminatory motive is a precondition for liability under Title VII.

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[20] Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), *aff'd in part and rev'd in part*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791)

Title VII is a remedial statute designed to eradicate discrimination in employment. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971). Like other remedial statutes, it must be construed liberally and in a fashion that achieves the congressional purpose for which it was enacted. *E.g.*, Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

[21] 671 F.2d at 334 (citations omitted); Pet. App. A-8.

Because separate actuarial tables were maintained by the *insurers* rather than the employer, it follows, according to Arizona, that any discriminatory motivation that may have existed cannot be attributed to the employer.

Arizona's argument hinges on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and several subsequent decisions that refine the holding in *McDonnell Douglas*, notably *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). These cases, however, use the term "discriminatory motivation" in a wholly different sense than it is used by Arizona.

McDonnell Douglas and its progeny address the evidentiary problems that arise when a Title VII plaintiff who alleges that an employer has discriminated on the basis of sex or race relies only on circumstantial evidence to prove that claim, and the employer responds that *some other motivating factor* was actually responsible for the decision to treat the employee in a disparate fashion. In such cases, employer and employee dispute whether the employer actually relied on a prohibited racial or sexual characteristic. The employer maintains that some factor unrelated to the employee's sex or race—for example, the employee's decision to engage in unlawful conduct (in *McDonnell Douglas*), or the employee's lack of specialized job skills (in *Furnco*), or the employee's inability to get along with co-workers (in *Burdine*)—was the reason for treating the employee differently. The employee must then show that these purported explanations are pretexts, and that the employee is "the victim of intentional discrimination" based on the employee's sex or race. *Burdine*, 450 U.S. at 256.

In cases in which the parties disagree over the basis for the employer's action in singling out employees who are members of a single sex or single race, the *McDonnell Douglas* line of cases provides an evidentiary mechanism for resolving the disputed question. When there is no

dispute, however, there is no occasion to apply *McDonnell Douglas*. If the employer offers no pretext for his conduct—if, in other words, the employer freely acknowledges that sexual or racial generalizations were used to classify employees—then the employer's conduct is discriminatory on its face, regardless of the employer's asserted justification. The question is no longer the preliminary, merely evidentiary one addressed in *McDonnell Douglas* (how should the court resolve the dispute over the employer's true reason for treating the plaintiff differently?), but whether the employer's admitted reliance on a sexual or racial classification scheme violates Title VII.[22]

A pension plan that classifies participants by sex is, to borrow a phrase used repeatedly in *Manhart*, "discriminatory on its face."[23] There is no dispute in *Manhart* or in any of the post-*Manhart* pension cases that employers treated their female employees differently solely because of their sex. They acted intentionally, and by so doing they violated Title VII.[24] They treated the members of the female group differently by paying each one of them

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[22] If this Court intended the *McDonnell Douglas* approach to apply in pension discrimination cases, one would expect to find references to *McDonnell Douglas* and other analytically related disparate treatment cases in *Manhart*. There are, of course, no such references. With the exception of the Sixth Circuit's recent decision in *Peters*, no court has ever applied *McDonnell Douglas* in a pension discrimination case. For the reasons explained in our *amicus* brief in *Peters*, we believe that the Sixth Circuit decided that case in a manner that conflicts directly with this Court's decision in *Manhart*.

[23] 435 U.S. at 715, 716. *See also* Connecticut v. Teal, —— U.S. ——, 50 U.S.L.W. 4716, 4720 (U.S. June 21, 1982) (No. 82-2147) ("*Manhart* . . . involved facially discriminatory policies"). The court below used the same phrase to describe Arizona's plan here. 671 F.2d at 334, Pet. App. A-6 ("on their face the practices in question treat men and women differently . . .").

[24] Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), *petition for cert. granted*, 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982) (No. 82-52); Spirt v. TIAA-CREF, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982)

a smaller periodic benefit than a comparably situated member of the male group would receive. The Title VII plaintiff satisfies her burden of proof by showing this and nothing more—a "simple test" indeed, as the Court in *Manhart* observed.[25]

An employer's discriminatory intent, in sum, can be proven inferentially without resorting to the evidentiary mechanisms provided by *McDonnell Douglas*, *Furnco*, or *Burdine*. Here, as in *Manhart*, the employer acknowledges that it has engaged in an employment practice that is discriminatory on its face. The employer offers no pretextual justification. Under the circumstances, Arizona's intent to discriminate is clearly established.

III. The McCarran-Ferguson Act Does Not Insulate Arizona from Liability under Title VII.

Several of the *amicus* briefs argue that the applicability of Title VII is limited by the McCarran-Ferguson Act.[26] The point was not raised by the petition, and

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(No. 82-791); Retired Public Employees' Ass'n v. California, 677 F.2d 733 (9th Cir 1982), *petition for cert. filed*, 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978); Probe v. State Teachers Retirement System, 28 Empl. Prac. Dec. (CCH) ¶ 32,602 (C.D. Cal. 1981); Hannahs v. New York State Teachers Retirement System, 26 Empl. Prac. Dec. (CCH) ¶ 32,037 (S.D.N.Y. 1981); Women in City Government United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981); Shaw v. Int'l Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980). *Cf.* Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975) (pre-*Manhart* decision); Reilly v. Robertson, 226 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977) (decided on constitutional rather than statutory grounds). *Contra*, Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 10, 1982) (No. 82-794).

[25] 435 U.S. at 711.

[26] *E.g.*, Brief of American Council of Life Insurance as Amicus Curiae in Support of Petitioners 25-26; Amicus Curiae Brief of the National Association of Insurance Commissioners 13-22; TIAA-CREF *Amicus* Br., *supra* note 9, at 8.

the Court may see fit to disregard it for that reason alone. Rule 21.1(a). In any event, the suggestion has no merit.

Many lower courts have examined the relationship between the McCarran-Ferguson Act[27] and Title VII. All have found that Title VII is not preempted or limited by the Act in any way.[28]

Section 2 of the Act[29] provides in pertinent part that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." The Act was intended to provide a limited exemption from the federal antitrust laws for insurance companies that were already subject to sub-

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[27] 15 U.S.C. § 1011 *et seq.* (1976) (referred to hereinafter as the "Act").

[28] Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1063-66 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791); Equal Empl. Opportunity Comm'n v. Wooster Brush Co., 523 F. Supp. 1256, 1265 (N.D. Ohio 1981); Women in City Government United v. City of New York, 515 F. Supp. 295, 302-303 (S.D.N.Y. 1981); Peters v. Wayne State Univ., 476 F. Supp. 1343, 1350-51 (E.D. Mich. 1979), *rev'd on other grounds*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 10, 1982) (No. 82-794). *Cf.* Dunn v. Midwestern Indemnity Midamerican Fire & Casualty Co., 472 F. Supp. 1106, 1111-12 (S.D. Ohio 1979) (holding that Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* (1976), is not preempted by the Act); Ben v. General Motors Acceptance Corp., 374 F. Supp. 1199, 1202-1203 (D. Colo. 1974) (holding that the Act does not preempt 42 U.S.C. § 1982 (1976)).

The employer in *Spirt* recently told this Court that "the Second Circuit's ruling on the application of the McCarran-Ferguson Act appears to be eminently correct and is not in conflict with any other circuit." Petition for a Writ of Certiorari 11 *in* Long Island Univ. v. Spirt, *supra* note 1.

[29] 15 U.S.C. § 1012 (1976).

stantial regulation at the state level.[30] It provides statutory insulation, however, only for companies or other entities that are engaged in the "business of insurance." As this Court recently held, the Act is construed narrowly when applied to parties "wholly outside the insurance industry."[31] That, of course, describes the State of Arizona.

Furthermore, it is clear from the language of Title VII and from illuminating legislative history concerning Title VII that that statute imposes precisely the kind of "paramount federal regulation"[32] to which Arizona would be subject even if the State were engaged in the business of insurance. Title VII contains, in Section 708, a limitation on the reach of the McCarran-Ferguson Act.[33] That Congress fully intended Title VII to apply to discriminatorily administered pension plans notwithstanding the Act is confirmed by the legislative history of the Employee Retirement Income Security Act of 1974 ("ERISA").[34] By expressly preempting state regulation

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[30] SEC v. National Securities, Inc., 393 U.S. 453, 458-59 (1969); *Spirt, supra*, 691 F.2d at 1065.

[31] Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979).

[32] SEC v. National Securities, Inc., *supra*, 393 U.S. at 459.

[33] "Nothing in [Title VII] shall be deemed to exempt or relieve any person from any liability . . . provided by any present or future law of any State . . ., other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e-7 (1976). The Second Circuit has observed of this provision: "To the extent that [state] law . . . permits . . . the use, or continued use, of gender-based mortality tables in violation of Title VII, it is clearly preempted under § 2000e-7." *Spirt, supra*, 691 F.2d at 1066.

[34] 29 U.S.C. § 1001 *et seq.* (1976 & Supp. IV 1980).

While the legislative history of subsequently enacted laws is not ordinarily accorded persuasive weight, this Court has examined the history of subsequent legislation in construing Title VII. *See* Zipes v. Trans World Airlines, Inc., 50 U.S.L.W. 4238, 4240 (U.S. Feb. 24, 1982) (No. 78-1545).

of retirement plans,[35] Congress made it clear that the national policy against racial and sexual discrimination outweighed the importance of preserving state regulatory jurisdiction. In the debates leading to the enactment of ERISA, Senator Mondale proposed an amendment expressly outlawing sex discrimination in the provision of pension benefits. He was persuaded to withdraw his proposed amendment only after Senator Williams, author of the 1972 amendments to Title VII, assured him that Title VII already prohibited such discrimination. "In light of [Senator Williams'] views," Senator Mondale told his colleagues, "and with the understanding that nondiscrimination in pension and profit-sharing plans *is fully required* under [Title VII], I will not propose my amendment at this time." [36]

"[I]t is apparent," observed one district court judge after reviewing the legislative history of ERISA, "that Congress' concern that discrimination in employee benefits be prohibited outweighed the interest it had in the insurance industry and in the preservation of state insurance regulation." [37] The Second Circuit reached the same conclusion: "Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as 'the business of insurance.' " [38]

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[35] ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1976).

[36] 119 CONG. REC. 30409-19 (1973) (emphasis added).

[37] Women in City Government United v. City of New York, 515 F. Supp. 295, 305 (S.D.N.Y. 1981).

[38] *Spirt, supra*, 691 F.2d at 1065.

CONCLUSION

The involvement of insurance companies in an employer-sponsored pension plan does not significantly distinguish this case from *Manhart*. On the strength of the Court's decision in *Manhart*, the judgment of the court below should be affirmed.

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